

Jan 23, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAINA BLEDSOE, a single woman,

Plaintiff,

v.

FERRY COUNTY, WASHINGTON;
MICHAEL BLANKENSHIP, in his
personal, representative, and
professional capacity; NATHAN
DAVIS, in his personal,
representative, and professional
capacity; JOHNNA EXNER, in her
personal, representative, and
professional capacity; and AMANDA
ROWTON, in her personal,
representative, and professional
capacity,

Defendants.

NO: 2:19-CV-227-RMP

ORDER RESOLVING
DEFENDANTS' MOTION TO
DISMISS

Jaina Bledsoe is a community political activist who was criminally charged for using chalk to write on the walkway leading to the Ferry County Commission Building. Ms. Bledsoe alleges that at various times in 2017 Commissioner Mike Blankenship publicly called certain citizens "sheep" and "jackasses." ECF No. 1

ORDER RESOLVING DEFENDANTS'
MOTION TO DISMISS ~ 1

1 at 4. He focused these remarks on people who disagreed with his plans regarding a
2 local recreational trail. *Id.* In response to these comments, Ms. Bledsoe delivered
3 a shepherd’s crook and a note to Commissioner Blankenship’s office; the note
4 stated: “Mike—The ‘sheep’ that are all concerned ‘jackasses’ about that ‘piece of
5 shit trail’ would like to ensure that you have the proper tools for your particular
6 leadership style. Enjoy!” *Id.* at 5. Ferry County Commissioners Nathan Davis
7 and Johnna Exner immediately called the police to report the note and shepherd’s
8 crook delivery. *Id.*

9 On February 26, 2018, the Board of Commissioners held a public hearing to
10 address issues regarding the recreational trail. *Id.* Prior to the meeting, Ms.
11 Bledsoe wrote messages in chalk on the walkway leading to the Ferry County
12 Commission Building. *Id.* These messages stated, “You are not sheep,” and “You
13 are not jackasses.” *Id.* Ms. Bledsoe claims that she wrote these messages to
14 encourage citizens to speak out against Commissioner Blankenship at the public
15 meeting. *Id.* The Board of Commissioners also had posted notices regarding the
16 same meeting on the doors to the Commission Building, just feet away from Ms.
17 Bledsoe’s chalk messages. *Id.* Ms. Bledsoe states that her messages did not cause
18 any harm to the building, walkway, or any other structure, nor did they impair
19 access to the public walkways or the building. *Id.* at 6.

20 Ms. Bledsoe alleges that, upon seeing the messages, the Clerk of the Board
21 of Commissioners, Amanda Rowton, called the Ferry County law enforcement

1 dispatcher and demanded that an officer confront Miss Bledsoe. *Id.* When
2 dispatching the responding officer, the dispatcher stated, “it was just in chalk, but
3 they’re requesting contact.” *Id.*; ECF No. 10-5 at 3. Then, Ms. Bledsoe alleges
4 that either Ms. Rowton or another agent of the Commission began removing her
5 chalked statements. ECF No. 1 at 6.

6 On March 21, 2018, the Ferry County Prosecuting Attorney brought a
7 charge of malicious mischief in the third degree against Ms. Bledsoe, based on the
8 chalk messages that she wrote prior to the public meeting on February 26, 2018.
9 *Id.* at 7. Ms. Bledsoe alleges that the Commissioners’ office “was in close contact
10 with the Prosecuting Attorney’s Office before and after the Complaint was filed.”
11 *Id.* Furthermore, she claims that Commissioner Blankenship told staff at the
12 Prosecuting Attorney’s office that Ms. Bledsoe should be convicted and sentenced
13 to the maximum one-year jail sentence and fined \$5,000 for her actions. *Id.* at 8.
14 Additionally, Ms. Bledsoe alleges that an anonymous “concerned citizen” called
15 the Prosecuting Attorney’s Office with advice on charging and venue regarding
16 Ms. Bledsoe’s case; she implies, but does not plead, that the caller worked for the
17 Commission. *Id.*

18 On August 20, 2018, after a *Knapstad* hearing, the state court dismissed the
19 charge against Ms. Bledsoe. ECF No. 10-5. Judge Thomas Brown concluded that
20 writing in chalk on a walkway is not “property damage” for the purposes of
21 malicious mischief in the third degree. *Id.* at 5. In his order, Judge Brown also

1 stated: “[T]his is not about chalk. This is about a personal dislike for a citizen of
2 Ferry County.” *Id.* at 7.

3 In October 2016, at a “candidates night,” Commissioner Nathan Davis was
4 asked about the Commission’s support of Ms. Bledsoe’s prosecution. ECF No. 1
5 at 9. In his response, he allegedly supported Ms. Bledsoe’s prosecution, stating
6 that she was to blame for “a pattern of stuff that [was] starting to happen” before a
7 contentious meeting. *Id.*

8 On July 2, 2019, Ms. Bledsoe filed a Complaint in this Court against
9 Defendants Ferry County, Commissioner Michael Blankenship, Commissioner
10 Nathan Davis, Commissioner Johnna Exner, and Clerk Amanda Rowton. ECF No.
11 1. Ms. Bledsoe has named each individual defendant in his or her individual and
12 official capacities. She alleges that each Defendant violated her First Amendment
13 right to free speech, and she brings a state claim of malicious prosecution against
14 all Defendants. *Id.* Defendants now move to dismiss for failure to state a claim.

15 **LEGAL STANDARD**

16 Complaints filed in federal court must contain “a short and plain statement of
17 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

18 When a defendant challenges a complaint’s sufficiency under Fed. R. Civ. P.
19 12(b)(6), the court must determine whether the complaint bears “sufficient factual
20 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”

21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the plaintiff

1 pleads “factual content that allows the court to draw the reasonable inference that the
2 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “In sum, for
3 a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and
4 reasonable inferences from that content, must be plausibly suggestive of a claim
5 entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962,
6 969 (9th Cir. 2009). In deciding a Rule 12(b)(6) motion to dismiss, a court
7 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings
8 in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &
9 Marin Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

10 **I. Section 1983 Claims**

11 Ms. Bledsoe brings her First Amendment claims against Defendants through
12 42 U.S.C. § 1983. “Traditionally, the requirements for relief under [§] 1983 have
13 been articulated as (1) a violation of rights protected by the Constitution or created
14 by a federal statute, (2) proximately caused (3) by the conduct of a ‘person’ (4)
15 acting under color of state law.” *Crumpton v. Gates*, 947, F.2d 1418, 1420 (9th
16 Cir. 1991).

17 **A. First Amendment Claim**

18 Ms. Bledsoe claims that Defendants infringed upon her First Amendment
19 right to free speech by removing her chalk statements from the sidewalk before her
20 intended audience could view them and by demanding her prosecution for
21 malicious mischief in retaliation for her chalked statements. Defendants respond

1 that their actions were constitutional because Washington’s malicious mischief
2 statute prohibits drawing on sidewalks in chalk. *See* RCW 9A.48.090(b).

3 Defendants argue that the state’s third-degree malicious mischief statute does not
4 infringe upon Ms. Bledsoe’s First Amendment rights.

5 Ms. Bledsoe alleges that she chalked a sidewalk, which constitutes a public
6 forum, or, in the alternative, a limited public forum. At the hearing, it became
7 clear that the nature of the chalked area is disputed. However, when the facts are
8 taken in the light most favorable to Ms. Bledsoe, the area that she chalked was a
9 sidewalk or public walkway, which constitutes a public form. *See Foti v. City of*
10 *Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

11 Public fora, which include places like streets and parks, “have immemorially
12 been held in trust for the use of the public, and . . . have been used for purposes of
13 assembly, communicating thoughts between citizens and discussing public
14 questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Frisby v. Schultz*,
15 487 U.S. 474, 480 (1988) (Public streets and walkways are the “archetype of a
16 traditional public forum.”). To decide which level of scrutiny applies to laws
17 restricting speech in public fora, the reviewing court must determine whether the
18 law is content-based or content-neutral. “Content-based regulations are
19 presumptively unconstitutional.” *Foti*, 146 F.3d, at 637. However, if the law is
20 content-neutral, then the state may place restrictions on the time, place, and manner
21 of speech, as long as such restrictions are “narrowly tailored to serve a significant

1 government interest, and leave open ample alternative channels of
2 communication.” *Id.* 635–36 (quoting *Perry Educ. Ass’n v. Perry Local*
3 *Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citation omitted)).

4 The Complaint in this matter does not expressly state whether Ms. Bledsoe’s
5 First Amendment challenge is a facial challenge or an “as-applied” challenge. In
6 her briefing, Ms. Bledsoe claims to challenge Washington’s third-degree malicious
7 mischief statute both on its face, and as applied to her. *See* ECF No. 9 at 2–3.
8 However, Ms. Bledsoe’s facial challenge is premised on Washington State law,
9 rather than the Federal Constitution. *See id.* Because Ms. Bledsoe brings her First
10 Amendment challenge through Section 1983, her claim must be premised on the
11 First Amendment of the United States Constitution, not the Washington State
12 Constitution. *See Armstrong v. Asselin*, 743 F.3d 984, 989 (9th Cir. 2013).

13 *As-Applied Challenge*

14 Ms. Bledsoe also argues in her briefing that she has pleaded a plausible “as-
15 applied” First Amendment challenge to Washington’s third-degree malicious
16 mischief statute. “An ‘as-applied’ challenge contends that the law is
17 unconstitutional as applied to the litigant’s particular speech activity, even though
18 the law may be capable of valid application to others.” *Foti v. City of Menlo Park*,
19 146 F.3d 629, 635 (9th Cir. 1998). In other words, the law is used to limit or
20 restrict speech based on the speaker’s message, even though, on its face, the law
21

1 may appear content neutral. *See id.* “A successful as-applied challenge does not
2 render the law itself invalid but only the particular application of the law.” *Id.*

3 The statute in question, Washington’s third-degree malicious mischief
4 statute, prohibits writing on buildings and structures, as well as “any real or
5 personal property owned by another person” RCW 9A.48.090(b). The statute
6 does not expressly discriminate based on the content of one’s message. *See id.*
7 However, Ms. Bledsoe has alleged that citizens frequently draw in chalk on the
8 sidewalk and are not prosecuted for doing so. ECF No. 1 at 7. For instance, she
9 claims that students from a local Christian school have chalked Bible verses and
10 messages of religious encouragement on the sidewalks and have not been
11 prosecuted for doing so. *Id.*

12 Ms. Bledsoe, on the other hand, chalked messages that opposed the
13 statements of Commissioner Blankenship, and it is undisputed that the malicious
14 mischief statute was enforced against her for her chalking. Ms. Bledsoe claims
15 that the Commissioners’ Office was in close contact with the Prosecutor’s Office,
16 directing her prosecution, and that Commissioner Blankenship told the
17 Prosecutor’s Office that Ms. Bledsoe should receive the maximum penalty for
18 malicious mischief in the third degree. *Id.* at 8. When the allegations in the
19 Complaint are taken as true, and when all reasonable inferences are drawn in Ms.
20 Bledsoe’s favor, Defendants sought the enforcement of Washington’s malicious
21 mischief statute against Ms. Bledsoe because of the content of her political

1 message. Therefore, Ms. Bledsoe has alleged successfully that Washington's
2 malicious mischief statute is unconstitutional as applied to her.

3 Because Ms. Bledsoe has pleaded a plausible First Amendment claim
4 through her as-applied challenge to Washington's third-degree malicious mischief
5 statute, her Section 1983 claim premised on the First Amendment survives
6 Defendants' Motion to Dismiss.

7 **B. First Amendment Retaliation Claim**

8 Ms. Bledsoe also brings a retaliatory prosecution claim under the First
9 Amendment. Government officials violate the First Amendment when they
10 retaliate against individuals for exercising their right to free speech. "[T]he law is
11 settled that as a general matter the First Amendment prohibits government officials
12 from subjecting an individual to retaliatory actions, including criminal
13 prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250 (2006); *Ariz.*
14 *Students' Ass'n v. Ariz. Bd. Of Regents*, 824 F.3d 858, 867 (9th Cir. 2016). To
15 succeed on a First Amendment retaliation claim, the plaintiff must prove:

- 16 (1) [he or she] engaged in constitutionally protected activity;
- 17 (2) the defendant's actions would "chill a person of ordinary firmness" from
18 continuing to engage in the protected activity; and
- 19 (3) the protected activity was a substantial motivating factor in the
20 defendant's conduct—i.e., that there was a nexus between the defendant's
21 actions and the intent to chill speech.

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1 *Ariz. Students' Ass'n*, 824 F.3d at 858 (quoting *O'Brien v. Welty*, 818 F.3d 920,
2 933–34 (9th Cir. 2016). Additionally, when the defendant is not the prosecuting
3 attorney in the underlying criminal case, the plaintiff must show that the defendant
4 “induced the prosecutor to bring charges that would not have been initiated without
5 his urging.” *Hartman*, 547 U.S. at 262.

6 Generally, the plaintiff in a First Amendment retaliation case must also
7 plead and prove a lack of probable cause. *See Nieves v. Bartlett*, 139 S. Ct. 1715,
8 1727 (2019); *see also Hartman*, 547 U.S. at 261. However, the Supreme Court
9 recently has clarified the want of probable cause requirement in the context of
10 retaliatory arrests. In *Nieves v. Bartlett*, the Court explained that, “[a]lthough
11 probable cause should generally defeat a retaliatory arrest claim, a narrow
12 qualification is warranted for circumstances where officers have probable cause to
13 make arrests, but typically exercise their discretion not to do so.” *Nieves*, 139 S.
14 Ct. at 1727 (2019). The Court then provided the following example to support its
15 logic:

16 [A]t many intersections, jaywalking is endemic but rarely results in arrest. If
17 an individual who has been vocally complaining about police conduct is
18 arrested for jaywalking at such an intersection, it would seem insufficiently
19 protective of First Amendment rights to dismiss the individual’s retaliatory
20 arrest claim on the ground that there was undoubted probable cause for the
21 arrest For those reasons, we conclude that the no-probable-cause
requirement should not apply when a plaintiff presents objective evidence
that he was arrested when otherwise similarly situated individuals not
engaged in the same sort of protected speech had not been.

1 *Id.* The Supreme Court's exception, as explained in *Nieves*, recognizes that
2 requiring the plaintiff to plead and prove lack of probable cause in every First
3 Amendment retaliation case does not sufficiently protect First Amendment rights.

4 Ms. Bledsoe's Complaint properly states the first element of her First
5 Amendment retaliation claim, as she alleged that she engaged in constitutionally
6 protected activity by writing political messages in chalk in a public forum.

7 Second, the Court considers whether Defendants' action would chill a person of
8 ordinary firmness from continuing to exercise her First Amendment rights. Ms.
9 Bledsoe has alleged that the Commissioners' Office encouraged and directed her
10 prosecution. ECF No. 1 at 8. She claims that Commissioner Blankenship asked
11 the prosecuting attorney to seek the harshest penalty possible under the malicious
12 mischief statute. *Id.* Facing criminal prosecution and a possible penalty of up to
13 one year in jail would chill a person of ordinary firmness from continuing to
14 exercise her right to free speech.

15 Third, Ms. Bledsoe has alleged facts that, if taken as true, show that the
16 protected activity was a substantial motivating factor contributing to her
17 prosecution. Ms. Bledsoe claims that her messages were designed to encourage
18 citizens to oppose Commissioner Blankenship at a public meeting. ECF No. 1 at 5.
19 In response to Ms. Bledsoe's chalking, Commissioner Blankenship allegedly told
20 the Prosecuting Attorney's Office that Ms. Bledsoe should be imprisoned for one
21 year and fined \$5,000. ECF No. 1 at 8. Ms. Bledsoe states that no other person in

1 the City of Republic has been prosecuted, imprisoned, or fined for writing on the
2 sidewalk in chalk. *Id.* at 7. From these factual allegations, the Court draws the
3 reasonable inference that the content of Ms. Bledsoe’s messages, rather than Ms.
4 Bledsoe’s act of chalking, caused Defendants to seek her prosecution. Therefore,
5 Ms. Bledsoe has stated facts sufficient to show that her alleged protected activity,
6 engaging in political speech via chalked messages, was a substantial factor
7 motivating Defendants’ conduct.

8 Fourth, the Court considers whether Defendants “induced the prosecutor to
9 bring charges that would not have been initiated without [their] urging.” *Hartman*,
10 547 U.S. at 262. As already explained, Ms. Bledsoe’s allegations indicate that
11 Defendants in the Commissioners’ Office initiated and directed her prosecution.
12 Additionally, Ms. Bledsoe’s Complaint states: “The citizens of Republic often
13 draw in chalk on the sidewalk without prosecution and without having their
14 messages removed by officials. For instance, students from a local Christian
15 school have chalked Bible verses . . . on the sidewalks and upon belief have not
16 been prosecuted or had their messages removed.” ECF No. 1 at 7. Therefore, Ms.
17 Bledsoe’s Complaint contains factual allegations showing that Defendants induced
18 the prosecutor to bring charges that would not have been brought otherwise.

19 Finally, the Court considers whether Ms. Bledsoe has alleged a lack of
20 probable cause. The charges against Ms. Bledsoe were dismissed because,
21 according to Judge Brown, writing in chalk is not property damage, which is an

1 essential element of RCW 9A.48.090(a), the crime for which Ms. Bledsoe was
2 charged. ECF No. 10-5. Defendants argue that probable cause existed to
3 prosecute Ms. Bledsoe under RCW 9A.48.090(b), a different subsection of
4 Washington’s third-degree malicious mischief statute that does not require proof of
5 property damage. However, Ms. Bledsoe was not charged with violating RCW
6 9A.48.090(b). Therefore, the Court finds that Ms. Bledsoe’s Complaint
7 demonstrates that there was a lack of probable cause “to bring the criminal charge”
8 against her. *See Hartman*, 547 U.S. at 261.

9 Alternatively, the Court finds that Ms. Bledsoe is not required under *Nieves*
10 to plead and prove a lack of probable cause, as Ms. Bledsoe has alleged facts
11 demonstrating that chalking on public sidewalks rarely, if ever, is prosecuted. *See*
12 *Nieves*, 139 S. Ct. at 1727. The Court emphasizes that this finding is made at an
13 early stage of the proceedings, under the 12(b)(6) standard.

14 For the foregoing reasons, Ms. Bledsoe has alleged a viable First
15 Amendment retaliation claim.

16 **C. First Amendment Claims Against the Individual Defendants**

17 Defendants argue that Ms. Bledsoe has failed to state plausible claims
18 against each of the individual Defendants. To state a viable constitutional claim
19 against each individual Defendant, the Complaint must demonstrate a causal link
20 between the individual Defendants’ actions and the alleged constitutional violation.
21 Defendants argue that the factual allegations in the Complaint do not establish such

1 a link between any one Defendant and the constitutional violations alleged. The
2 Court acknowledges that many of Ms. Bledsoe's allegations attribute conduct to
3 the "Commissioners' Office," rather than to any individual Commissioner. Ms.
4 Bledsoe argues that the Commissioners acted together to violate her First
5 Amendment rights, but she does not always specify which Commissioners took
6 which actions.

7 The Ninth Circuit has explained that, when multiple officers act to cause the
8 plaintiff's alleged constitutional violation, each officer's "liability under section
9 1983 is predicated on his 'integral participation in the alleged violation.'" *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (quoting
10 *Chuman v. Wright*, 76 F.3d 292, 294–95 (9th Cir. 1996)); *see also Nicholson v.*
11 *City of L.A.*, 935 F.3d 685, 691–92 (9th Cir. 2019) ("A police officer need not have
12 been the sole party responsible for a constitutional violation before liability may
13 attach."). "[I]ntegral participation' does not require that each officer's actions
14 themselves rise to the level of a constitutional violation." *Blankenhorn*, 485 F.3d
15 at 481 n.12 (quoting *Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004)).
16 However, "it does require some fundamental involvement in the conduct that
17 allegedly caused the violation." *Id.*

18
19 In *Boyd v. Benton County*, the Ninth Circuit further explained what "integral
20 participation" means. In that case, the court found that the plaintiff's Fourth
21 Amendment rights had been violated when police officers used a flash-bang

1 grenade during the search of the plaintiff's home. *Boyd*, 374 F.3d at 780. There,
2 the Ninth Circuit "reasoned that the use of the device was 'part of the search
3 operation in which every officer participated in some meaningful way.'" *See*
4 *Nicholson*, 935 F.3d at 692 (quoting *Boyd*, 374 F.3d at 780). Each officer "was
5 aware of the decision . . . , did not object to it, and participated in the search
6 operation knowing the flash-bang was to be deployed." *Id.* Therefore, each officer
7 was liable under the Fourth Amendment, even though only one officer reached into
8 the home and deployed the device. *Id.* Each officer's actions constituted integral
9 participation in the constitutional violation.

10 On the other hand, the Ninth Circuit has held that an officer is not an integral
11 participant in an unlawful arrest when she is "not present [at the arrest], and there
12 is no evidence that [she] instructed the other detectives to arrest [the plaintiff] or
13 that any of those detectives consulted with her before making the arrest." *Id.*
14 (quoting *Torres v. City of L.A.*, 548 F.3d 1197, 1206 (9th Cir. 2008)).

15 Given the Ninth Circuit's precedent on integral participation, Ms. Bledsoe's
16 Complaint must allege facts demonstrating that each Defendant was an integral
17 participant, or had "some fundamental involvement," in the alleged constitutional
18 violations. Again, the Court reiterates that it must take all the factual allegations in
19 the Complaint as true and draw all reasonable inferences in favor of Ms. Bledsoe,
20 as the instant motion is made pursuant to Rule 12(b)(6).

21 //

1 ***Commissioner Blankenship***

2 Ms. Bledsoe has asserted several factual allegations naming Commissioner
3 Blankenship specifically, indicating that he was involved in the claimed
4 constitutional violations. Perhaps most persuasive is Ms. Bledsoe's claim that
5 Commissioner Blankenship was in contact with the Prosecuting Attorney's Office,
6 and told them that "Ms. Bledsoe, who has no criminal record, should be convicted
7 and sentenced to the maximum one year in jail and \$5,000 fine for the Malicious
8 Mischief charge." ECF No. 1 at 8. This specific factual allegation supports Ms.
9 Bledsoe's claim that the Commissioners' Office was directing her prosecution. By
10 contacting the Prosecuting Attorney's Office and making charging
11 recommendations, Commissioner Blankenship had "some fundamental
12 involvement" in (1) enforcing the malicious mischief law against Ms. Bledsoe in
13 an unconstitutional manner and (2) retaliating against Ms. Bledsoe for her speech
14 in violation of the First Amendment. As Ms. Bledsoe has demonstrated that
15 Commissioner Blankenship was meaningfully involved in the alleged violations of
16 her First Amendment rights, Ms. Bledsoe has stated viable constitutional claims
17 against him.

18 ***Commissioner Davis***

19 Ms. Bledsoe's Complaint also contains several detailed allegations against
20 Commissioner Davis. First, she alleges that Commissioner Davis, in concert with
21 Commissioner Exner, called the police to report Ms. Bledsoe's note and shepherd's

1 crook delivery, prior to the chalking incident. ECF No. 1 at 5. Additionally, after
2 the chalking incident, Commissioner Davis allegedly justified Ms. Bledsoe's
3 prosecution. *Id.* at 9. In a public statement, he said that he was "concerned that
4 Ms. Bledsoe was responsible for 'a pattern of stuff that [was] starting to happen'"
5 during a politically sensitive and important time. *See id.* Commissioner Davis
6 made this statement in response to a question about the "Commission's support of
7 the criminal prosecution of Ms. Bledsoe." *Id.* Therefore, his response indicates
8 that he, in his role as Commissioner, supported Ms. Bledsoe's prosecution. Based
9 on these factual allegations, a reasonable inference may be drawn that
10 Commissioner Davis knew of, supported, and participated in the alleged
11 constitutional violations. Therefore, Ms. Bledsoe's Complaint states plausible
12 constitutional claims against Commissioner Davis.

13 ***Commissioner Exner***

14 The Complaint contains only one factual allegation related to Commissioner
15 Exner specifically. It claims that Commissioner Exner called the police, with
16 Commissioner Davis, when the Commissioners' Office received Ms. Bledsoe's
17 note and shepherd's crook. This single allegation involves Commissioner Exner's
18 activities prior to the chalking incident that is the subject of this action. Ms.
19 Bledsoe's Complaint contains no other allegations against Commissioner Exner.
20 The remaining allegations that potentially implicate Commissioner Exner involve
21 the actions of the "Commissioners' Office" as a whole. While a reasonable

1 inference may be drawn that Commissioner Exner knew of the Office's actions,
2 there simply are not enough factual allegations to conclude that Commissioner
3 Exner approved of the actions taken against Ms. Bledsoe, or that Commissioner
4 Exner was an integral participant in the alleged constitutional violations. Because
5 Ms. Bledsoe has failed to allege sufficient facts showing Commissioner Exner's
6 integral participation in the alleged constitutional violations, her Complaint fails to
7 allege a plausible constitutional violation against Commissioner Exner. Therefore,
8 Ms. Bledsoe's Section 1983 claims against Defendant Exner are dismissed without
9 prejudice.

10 ***Clerk Rowton***

11 The factual allegations relating to Ms. Rowton are as follows: Ms. Rowton
12 called law enforcement immediately after the chalking incident; she wanted to
13 report the incident because it was not the first time that Ms. Bledsoe had "acted out
14 against" the Commission; and Ms. Rowton may have removed Ms. Bledsoe's
15 chalk messages before the contentious meeting, so that the intended viewers could
16 not read them. ECF No. 1 at 6. Additionally, the Complaint states that the law
17 enforcement dispatcher responding to Ms. Rowton's call told the responding
18 officer that Ms. Rowton was "requesting contact," even though "it was just in
19 chalk." *Id.* These factual claims illustrate that Ms. Rowton initiated the police
20 response to Ms. Bledsoe's speech, and that her actions were motivated by Ms.
21 Bledsoe's "acting out" against the Commission. When the facts are viewed in the

1 light most favorable to Ms. Bledsoe, and when all reasonable inferences are drawn
2 in her favor, Ms. Rowton knew of and meaningfully participated in the alleged
3 First Amendment violations. Therefore, Ms. Bledsoe’s Complaint alleges
4 plausible First Amendment violations against Defendant Rowton.

5 **D. The County’s Liability Under *Monell***

6 Defendants argue that the Section 1983 claims against Defendant Ferry
7 County must be dismissed, pursuant to *Monell v. Dep’t of Soc. Servs. of New York*,
8 436 U.S. 658 (1977). *Monell* made clear that local governments are “persons” for
9 the purposes of 42 U.S.C. § 1983. *Id.* at 690. Defendants may therefore sue local
10 governments for constitutional violations under the statute. However, local
11 governments may not be held liable on a theory of *respondeat superior* for the
12 actions of their employees and agents. *Id.* Instead, the local government’s actions
13 must have caused the constitutional violation. The Supreme Court explained that
14 there must be a local policy, practice, or custom that caused the plaintiff’s injury.
15 *Id.* at 694.

16 Since *Monell* was decided, the Supreme Court has held that “an
17 unconstitutional governmental policy could be inferred from a single decision
18 taken by the highest officials responsible for setting policy in that area of the
19 government’s business.” *City of St. Louis v. Praprontik*, 485 U.S. 112, 123 (1988);
20 *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 181–83 (1986) (“[I]t is plain
21 that municipal liability may be imposed for a single decision by municipal

1 policymakers under appropriate circumstances.”). In other words, a county may be
2 held liable for an isolated constitutional violation inflicted by officials with “final
3 policymaking authority” with respect to the action ordered.

4 Whether an official has “final policymaking authority” is a question of state
5 law. *City of St. Louis*, 485 U.S. at 123. “The States have extremely wide latitude
6 in determining the form that local government takes, and local preferences have led
7 to a profusion of distinct forms.” *Id.* at 124. When an official’s discretion
8 regarding policy decisions is not meaningfully constrained or subject to review by
9 a superior, then the policymaker likely has “final policymaking authority.” *See id.*
10 Additionally, “No one has ever doubted . . . that a municipality may be liable under
11 § 1983 for a single decision by its properly constituted legislative body—whether
12 or not that body had taken similar action in the past or intended to do so in the
13 future—because even a single decision by such a body unquestionably constitutes
14 an act of official government policy.” *Pembaur*, 475 U.S. at 480 (citing *Owen v.*
15 *City of Independence*, 445 U.S. 622 (1980) (City Council passed resolution firing
16 plaintiff without a pretermination hearing) and *Newport v. Fact Concerts, Inc.*, 453
17 U.S. 247 (1981) (City Council canceled license permitting concert because of
18 dispute over content of performance)). “[W]here action is directed by those who
19 establish governmental policy, the municipality is equally responsible whether that
20 action is to be taken only once or to be taken repeatedly.” *Id.*

1 Ms. Bledsoe alleges that the Commission decided to seek her prosecution
2 because of her political ideas and speech. She alleges that the County
3 Commissioners, who make up the County's legislative body, acted together to
4 censor her and to direct her prosecution. *See* RCW 36.32.120. Defendants argue
5 that the County Commissioners were not final policymakers with respect to their
6 actions against Ms. Bledsoe. Therefore, those actions cannot be attributed to the
7 County. *See* ECF No. 10 at 8.

8 The Court must therefore decide whether the Plaintiff has alleged sufficient
9 facts to support a reasonable inference that the Commissioners were acting as
10 policymakers when requesting, and allegedly directing, Ms. Bledsoe's prosecution.
11 As the Supreme Court has explained, even one decision by a properly constituted
12 legislative body "unquestionably constitutes an act of official government policy."
13 *Pembaur*, 475 U.S. at 480. Additionally, as Ms. Bledsoe points out, Washington
14 law provides that the Commission shall, "Have the care of the county property . . .
15 and in the name of the county prosecute and defend all actions for and against the
16 county" RCW 36.31.120(6). Defendants have not pointed to state law
17 indicating that the Commissioners' actions were meaningfully constrained by a
18 superior, or that their decisions with respect to Ms. Bledsoe would be reviewed by
19 a superior policymaking official.

20 By arguing that the County Commissioners were not acting in their role as
21 final policymakers, Defendants seem to suggest that the Prosecuting Attorney's

1 Office had final policymaking authority with respect to the charges brought against
2 Ms. Bledsoe. Therefore, the Court examines the relationship between the
3 Prosecuting Attorney's Office and the County Commissioners' Office in Ferry
4 County. Upon turning to Washington state law, the Court found few cases that
5 illustrate the relationship between prosecuting attorneys' offices and county
6 commissioners' offices in Washington. However, in *State ex rel. Banks v.*
7 *Drummond*, the Washington State Supreme Court discussed the relationship
8 between the prosecuting attorney and the county commission briefly. 385 P.3d
9 769 (Wn.2d 2016). It appears from *Banks* that the county commissioners' office
10 exercises control over the prosecuting attorney's office through governance of the
11 office's size and budget. As the State Supreme Court explained:

12 The Board's consent is required to establish and fund all unelected employee
13 positions, including those in the prosecuting attorney's office. RCW
14 36.16.070 ("In all cases where the duties of any county office are greater
15 than can be performed by the person elected to fill it, the officer may employ
deputies and other necessary employees with the consent of the board of
county commissioners. The board shall fix their compensation . . .").

16 *Banks*, 385 P.3d at 773.

17 The *Banks* Court continued to explain that there had been "professional
18 disagreements about policy and about budgets from time to time" between the
19 county commission and the prosecuting attorney's office in that matter; the county
20 commission had decided to decrease funding to the prosecuting attorney's office,
21 granting funding for the highest-priority criminal staff position only. *Id.* The

1 Washington State Supreme Court’s discussion in *Banks* indicates that Defendants
2 in this case have the ability to set, or at least influence significantly, policy in the
3 Prosecuting Attorney’s Office.

4 Moreover, Washington law dictates that the prosecuting attorney in each
5 county is the “legal advisor of the legislative authority” who gives “his or her
6 written opinion when required by the legislative authority,” and who prosecutes
7 “all criminal and civil actions in which the state or the county may be a party.”
8 RCW 36.27.020(1), (4). Therefore, Washington law indicates that the prosecuting
9 attorney in each county, at least to some extent, answers to the legislative
10 authority, the County Commission.

11 The Court notes that the issue of final policymaking authority, and the
12 relationship between the Prosecuting Attorney’s Office and Ferry County
13 Commissioners’ Office, was not thoroughly briefed. However, given this Court’s
14 review of Washington state law and Ms. Bledsoe’s Complaint, the Court finds that
15 Ms. Bledsoe has alleged sufficient facts to demonstrate that the County
16 Commissioners were policymaking officials, whose actions may constitute County
17 policy pursuant to *Monell* in this matter. Therefore, Ms. Bledsoe’s *Monell* claim
18 against the County survives Defendants’ Motion to Dismiss.

19 **E. Qualified Immunity**

20 The Court now considers the qualified immunity defenses raised by
21 Commissioner Blankenship, Commissioner Davis, and Secretary Rowton. The

1 Court does not consider the qualified immunity defense raised by Commissioner
2 Exner, as the Section 1983 claims against her already have been dismissed.

3 Government officials are entitled to qualified immunity “as long as their
4 actions could reasonably have been thought consistent with the rights they are
5 alleged to have violated.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The
6 purpose of qualified immunity is to balance “the need to hold public officials
7 accountable when they exercise power irresponsibly and the need to shield officials
8 from harassment, distraction, and liability when they perform their duties
9 reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

10 The Supreme Court has laid out a two-part test for resolving qualified
11 immunity claims. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part*
12 *on other grounds by Pearson*, 555 U.S. at 236. First, the court must decide whether
13 the defendant’s conduct violated a constitutional right. *Id.* at 201. Second, the court
14 must determine whether the identified constitutional right was clearly established at
15 the time of the alleged violation. *Saucier*, 533 U.S. at 201. As part of the second
16 step, the court also must consider whether the defendant’s interpretation of the law
17 was reasonable given the facts with which the defendant was presented. *Kennedy v.*
18 *City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). If the court finds that the
19 constitutional right was clearly established, but that the defendant made a reasonable
20 mistake in applying the law, then the defendant is entitled to qualified immunity. *Id.*

1 Because the Court is deciding qualified immunity in the context of a Rule
2 12(b)(6) motion to dismiss, the Court must take all of the factual allegations in the
3 Complaint as true and construe the pleadings in the light most favorable to Ms.
4 Bledsoe. *Henshaw v. Daugherty*, 125 Fed. Appx. 175, 176 (9th Cir. 2005) (citing
5 *Grant v. City of Long Beach*, 315 F.3d 1081, 1088–89 (9th Cir. 2002)); *see also*
6 *Manzarek*, 519 F.3d at 1031 (explaining motion to dismiss standard). If Ms.
7 Bledsoe cannot overcome qualified immunity based on her allegations, then
8 Defendants are entitled to qualified immunity, and the court may dismiss on those
9 grounds. *See id.*

10 ***Violation of a Constitutional Right***

11 The Court first decides whether Ms. Bledsoe’s Complaint alleges a
12 constitutional violation against Defendants. As this Court already has explained,
13 Ms. Bledsoe has alleged plausible claims under the First Amendment. Moreover,
14 the Court already has found that Ms. Bledsoe’s Complaint states plausible
15 constitutional claims against Commissioners Blankenship and Davis, and against
16 Secretary Rowton; Ms. Bledsoe properly alleged that each of these Defendants
17 were integral participants in the alleged constitutional violations.

18 ***Clearly Established Law***

19 Second, the Court must consider whether the asserted First Amendment rights
20 were clearly established at the time of the violation. Specifically, Ms. Bledsoe has
21 alleged that the County Commissioners acted against her, in order to chill her

1 political speech in a public forum, before an important public meeting. It is clearly
2 established that public officials cannot take action with the intent to “retaliate
3 against, obstruct, or chill the plaintiff’s First Amendment rights. *Ariz. Students’*
4 *Ass’n.*, 824 F.3d at 858. Indeed, it is settled law that “the First Amendment
5 prohibits government officials from subjecting an individual to retaliatory actions,
6 including criminal prosecutions, for speaking out.” *Hartman*, 547 U.S. at 256;
7 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 716–17 (9th Cir. 2012). Therefore, the
8 First Amendment rights that Ms. Bledsoe asserts were clearly established.

9 As Ms. Bledsoe has plausibly alleged that Defendants Blankenship, Davis,
10 and Rowton violated her clearly established First Amendment rights, the Court
11 finds that, at this stage of the proceedings, these Defendants are not entitled to
12 qualified immunity.

13 **II. State Claim: Malicious Prosecution**

14 Ms. Bledsoe also has brought a claim of malicious prosecution, premised on
15 Washington state law. A successful claim of malicious prosecution under
16 Washington law requires the plaintiff to show the following:

- 17 (1) that the prosecution claimed to have been malicious was instituted or
18 continued by the defendant;
- 19 (2) that there was want of probable cause of the institution or continuation of
20 the prosecution;
- 21 (3) that the proceedings were instituted or continued through malice;

1 (4) that the proceedings terminated on the merits in favor of the plaintiff, or
2 were abandoned; and

3 (5) that the plaintiff suffered injury or damage as a result of the prosecution.

4 *Bender v. City of Seattle*, 664 P.2d 492, 500 (Wash. 1983).

5 The Washington State Supreme Court has explained, “Malice and want of
6 probable cause are the gist of the action.” *Id.* The malice prong is satisfied when
7 the plaintiff shows that the official acted with an improper motive or “in a reckless
8 disregard of the rights of the plaintiff.” *Id.* (quoting *Peasley v. Puget Sound Tug &*
9 *Barge Co.*, 125 P.2d 681, 689 (Wash. 1942)). The court analyzes the existence of
10 probable cause under an objective, reasonable person standard. *Id.* at 502.

11 “Probable cause exists where the facts and circumstances within the arresting
12 officer’s knowledge and of which he has reasonably trustworthy information are
13 sufficient in themselves to warrant a man of reasonable caution in a belief that an
14 offense has been or is being committed.” *Gem Trading Co. v. Cudahy Corp.*, 603
15 P.2d 828 (Wash. 1979). Probable cause must exist through the entire prosecution.
16 *Rodriguez v. City of Moses Lake*, 243 P.3d 552, 554 (Wash. Ct. App. 2010). If the
17 criminal proceedings against the plaintiff were dismissed or terminated in the
18 plaintiff’s favor, then the plaintiff has established a prima facie case that probable
19 cause was lacking. *Id.*

20 First, Ms. Bledsoe was required to plead that Defendants instituted or
21 continued her prosecution. Ms. Bledsoe alleged that Ms. Rowtown, Clerk of the

1 Board of Commissioners, telephoned Ferry County law enforcement when Ms.
2 Bledsoe began chalking the walkway. ECF No. 1 at 6. In response, law
3 enforcement allegedly stated, “it was just in chalk, but they’re requesting contact.”
4 *Id.* When reasonable inferences are drawn in Ms. Bledsoe’s favor, it appears that
5 Ms. Rowton called law enforcement and asked them to make contact with Ms.
6 Bledsoe. Moreover, Ms. Bledsoe alleges that Commissioner Blankenship
7 contacted the Prosecuting Attorney’s Office before and after the complaint against
8 Ms. Bledsoe was filed. *Id.* at 8. “[U]pon belief” Commissioner Blankenship
9 “influenced that office to criminally prosecute Ms. Bledsoe’s free speech.” *Id.*
10 Ms. Bledsoe claims that Commissioner Blankenship told the Prosecuting
11 Attorney’s Office that Ms. Bledsoe should be convicted and receive the maximum
12 penalty. *Id.* She also alleges that an anonymous “concerned citizen” called the
13 Prosecuting Attorney’s Office with advice on charging and venue for the criminal
14 proceedings against her, suggesting that the anonymous citizen was acting at the
15 direction of the Commissioners. *Id.*

16 Additionally, when asked publicly about the Commissions’ support of Ms.
17 Bledsoe’s prosecution, Commissioner Davis responded that he was concerned that
18 Ms. Bledsoe was responsible for a “pattern” of “stuff” that was beginning to
19 happen during a sensitive political time. *Id.* at 9. These statements indicate that
20 Commissioner Davis supported Ms. Bledsoe’s prosecution and censorship. When
21 viewed in the light most favorable to Ms. Bledsoe, the factual allegations in the

1 Complaint support her argument that the Commissioners directed her prosecution,
2 to prevent her from speaking out against them. Therefore, Ms. Bledsoe has alleged
3 sufficient facts to illustrate that her prosecution was initiated or continued by
4 Defendants.

5 Next, Ms. Bledsoe must plead that there was want of probable cause for the
6 institution or continuation of her prosecution. Ms. Bledsoe's malicious mischief
7 charge was dismissed by Judge Brown, who found that writing in chalk on a
8 sidewalk does not constitute property damage, an essential element of the crime
9 with which Ms. Bledsoe was charged. Such a dismissal establishes a prima facie
10 case of want of probable cause. *See Rodriguez*, 243 P.3d at 554.

11 Defendants argue that the Prosecutor's Office made a charging mistake and
12 that Ms. Bledsoe should have been charged with malicious mischief under RCW
13 RCW 9A.48.090(b), which does not require property damage. Defendants argue
14 that there was probable cause to prosecute Ms. Bledsoe under subsection (b), and
15 therefore Ms. Bledsoe's malicious prosecution claim must fail. Defendants
16 essentially argue that, because the state could have charged Ms. Bledsoe under
17 subsection (b) of the statute, there was continued probable cause to prosecute her
18 under subsection (a). However, to decide if probable cause exists throughout a
19 prosecution, the Court naturally must look to the charges actually filed and
20 pursued, not hypothetical, unfiled charges for which probable cause may exist.

21 The state did not have probable cause to continue its prosecution under RCW

1 9A.48.090(a), and the state never amended its charges against Ms. Bledsoe, despite
2 the alleged charging mistake. Under these facts, Ms. Bledsoe has pleaded want of
3 probable cause. *See Rodriguez*, 243 P.3d at 554.

4 Furthermore, even if the Prosecuting Attorney’s Office meant to charge Ms.
5 Bledsoe with violating subsection (b) rather than subsection (a), it is not clear that
6 probable cause existed to prosecute Ms. Bledsoe under subsection (b). Subsection
7 (b) of the statute prohibits writing or marking “on any public or private building or
8 other structure or any real or personal property owned by another person unless the
9 person has obtained the express permission of the owner or operator of the
10 property” RCW 9A.48.090(b). This subsection clearly forbids drawing on
11 public buildings, but Ms. Bledsoe alleges that she wrote on a public walkway, not a
12 building. The statute also forbids chalking any real property owned by another
13 person, but, at this point, the parties have not indicated whether the walkway was
14 owned by another “person” within the meaning of RCW 9A.48.090(b). It is
15 unclear from the briefing and from the Court’s review of the case law whether
16 there was probable cause to seek the prosecution of Ms. Bledsoe under subsection
17 (b). However, because Ms. Bledsoe was not prosecuted under subsection (b), the
18 Court need not make findings as to whether there was probable cause to prosecute
19 Ms. Bledsoe under that subsection of the statute.

20 Third, Ms. Bledsoe must allege that the proceedings were initiated or
21 continued through malice. As explained above, Ms. Bledsoe has alleged specific

1 facts showing that the Commissioners' Office retaliated against her for her chalked
2 message by directing her prosecution in violation of her First Amendment rights.
3 These allegations constitute malice, or "a reckless disregard" of Ms. Bledsoe's
4 rights. *See Bender*, 664 P.2d at 500 (quoting *Peasley*, 125 P.2d at 689). Fourth,
5 Ms. Bledsoe must allege that the criminal proceedings were terminated in her
6 favor, which she has done by explaining that Judge Brown granted her motion to
7 dismiss. *Id.* at 8. Finally, Ms. Bledsoe must plead that she suffered damages as a
8 result of the prosecution. Ms. Bledsoe alleges that she was required to submit to
9 restrictions on residency at her arraignment while her mother was dying in Oregon.
10 She also alleges that she has suffered financial losses and mental pain and anguish.
11 ECF No. 1 at 14. Therefore, Ms. Bledsoe has alleged damages.

12 Because Ms. Bledsoe has pleaded a plausible claim for malicious
13 prosecution under Washington State law, her malicious prosecution claim survives
14 Defendants' Motion to Dismiss. However, again, the Court must consider whether
15 Ms. Bledsoe's Complaint has alleged a viable claim against each Defendant. For
16 reasons this Court already has expressed, Ms. Bledsoe has not alleged enough facts
17 to suggest that Commissioner Exner took any action in response to her chalking.
18 Therefore, Ms. Bledsoe's malicious mischief claim against Commissioner Exner is
19 dismissed, with leave to amend.

Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss, **ECF No. 8**, is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's claims against Defendant Exner are **dismissed without prejudice**.

DATED January 23, 2020.